

METTUBE SDN BHD

TAIACE ENGINEERING SDN BHD

HIGH COURT MALAYA, SHAH ALAM
 NORAINI ABDUL RAHMAN JC
 [COMPANIES (WINDING UP) NO: MT1-28-292-2008]
 6 MARCH 2009

This was a petition to wind up the respondent company under s. 218(1)(e) of the Companies Act 1965. The respondent did not file any affidavit to oppose the petition at all. However, at the hearing of the petition, counsel for the respondent informed the court that a notice of intention to appear was served on the petitioner as required under r. 28 of the Companies (Winding Up) Rules 1972 and prayed for an adjournment for the court to hear the petition to strike out first.

F (1) The Companies (Winding Up) Rules are very strict because winding up is a very serious action. Both petitioner and respondent company is in law given rights to be heard in court. The petitioner had complied with all the requirements to have the petition be granted. Instead there was a blatant failure by the respondent to file an affidavit to oppose the petition. (*Dataprep (Malaysia) Sdn Bhd v. Utas Linkage Sdn Bhd*) (para 5)

G (2) If the respondent intended to contest a winding up petition it should file an affidavit to oppose the petition under r. 30(1) Companies (Winding Up) Rules 1972. It was an undisputed fact that an affidavit to oppose the petition under r. 30 of the Companies (Winding Up) Rules 1972 was not filed herein.

H (*Crocuses & Daffodils (M) Sdn Bhd v. Development & Commercial Bank Bhd* and *Anvest Corporation Sdn Bhd v. Wong Siew Choong Sdn Bhd*). Instead, the respondent issued and served to the petitioner a notice of intention to appear under r. 28 Companies (Winding Up) Rules 1972. If the respondent was

I serious in contesting the matter, it should have filed the

application months ago immediately after it was served with the petition. Instead, it filed the application on the day before the proceeding. This was an attempt to simply delay the hearing of the petition. (paras 6, 7 & 8)

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Case(s) referred to:

Anvest Corporation Sdn Bhd v. Wong Siew Choong Sdn Bhd [2008] 3 CLJ 317 CA (*refd*)

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Ayer Molek Rubber Co Bhd v. Mirra Sdn Bhd [2008] 2 CLJ 459 CA (*refd*)
Crocuses & Daffodils (M) Sdn Bhd v. Development & Commercial Bank Bhd [1997] 3 CLJ 485 CA (*refd*)

Dataprep (Malaysia) Sdn Bhd v. Utas Lambang Sdn Bhd [2009] 7 CLJ 163 HC (*refd*)

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Vovici Corporation v. MCSB Data Systems (Unreported) (*refd*)

Legislation referred to:

Companies Act 1965, s. 218(1)(e)

Companies (Winding Up) Rules 1972, rr. 28, 30(1)

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For the petitioner - K Kavita; M/s Shearn Delamore & Co

For the respondent - Hasanuddin Hj Puteh; M/s Mathews & Assocs

Reported by Suhainah Wahiduddin

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JUDGMENT**Noraini Abdul Rahman JC:**

[1] This is a petition to wind up the respondent company under s. 218(1)(e) of the Companies Act 1965. The petition was filed on 13 October 2008 and served on the respondent on 27 November 2008.

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[2] The hearing of the petition was fixed on 18 February 2009. The respondent did not file any affidavit to oppose the petition at all.

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[3] At the hearing of the petition on 18 February 2009, counsel for respondent informed the court that a notice of intention to appear was served on the petitioner as required under r. 28 of the Companies (Winding Up) Rules 1972. He prayed for an adjournment for the Court to hear the petition to strike out first.

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Oral submissions were heard by me.

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A [4] Respondent's Counsel

- B** (a) The Companies (Winding Up) Rules 1972 says that an affidavit in opposition should be filed at least seven days before hearing of the petition. However r. 28 allows a person to file notice of intention to appear at the hearing to be served not later than 12.00 o'clock on a day previous to the hearing date. I am representing the person who intends to oppose and I am asking for an adjournment because it is impossible to file an affidavit within seven days when he appointed me and instructed me to file yesterday. I am acting for one shareholder as well as respondent company.
- C**
- (b) We are applying for another date because we have filed an application to strike out the petition which unfortunately was filed yesterday (the day before the hearing).
- D** (c) The application to strike out the petition is made on the basis that the petition is based on a default judgment.
- (d) Notice to strike out was filed unfortunately yesterday due to the fact that my client managed to collate evidence to show ability to pay its debt and also there is an injection of capital which has recently been finalised.
- E** (e) I plead that the court postpone this morning's application to hear my application which was filed yesterday.

F [5] Petitioner's Counsel

- (a) The respondent had not filed an affidavit in opposition within seven days before today's hearing.
- G** (b) Court decisions have held that r. 30 Companies (Winding-up) Rules 1972 is a mandatory requirement and had to be adhered to.
- i) *Ayer Molek Rubber Co Bhd v. Mirra Sdn Bhd* [2008] 2 CLJ 459
- H** ii) *Anvest Corporation Sdn. Bhd v. Wong Siew Choong* [2008] 3 CLJ 317
- iii) *Vovici Corporation v. MCSB Data Systems* (unreported as judgment just came out.)
- I** iv) *Dataprep (Malaysia) Sdn Bhd v. Utas Lambang Sdn Bhd* [2009] 7 CLJ 163.

- (c) My learned friend is asking for a stay ie, an adjournment of the winding up petition pending the disposal of his application which was served to me yesterday afternoon. Respondent's application is a striking out application, a setting aside application and a stay application, all rolled into one. This application served on the petitioner which is unsealed is nothing more than an attempt to delay the winding up proceeding. There is an appeal against a final judgment but the appeal does not constitute special circumstances nor does it operate as a stay. A B
- (d) Counsel for respondent submitted that his client has just appointed him and hence it was impossible to file the affidavit in opposition. Our case is a winding up petition against respondent and the company has appointed my learned friend as their counsel a long time ago. There is no basis for shareholder to oppose the petition as the petition is filed against the company. So it should be the company that opposes the petition. The company has not filed the affidavit in opposition. Court of Appeal decisions had already decided on this point. C D
- (e) The Companies (Winding Up) Rules are very strict because winding up is a very serious action. Both petitioner and respondent company is in law given rights to be heard in court. Petitioner has complied with all the requirements to have the petition be granted today. Instead there is a blatant failure on the part of the respondent to file an affidavit to oppose the petition. I refer to *Dataprep (Malaysia) Sdn Bhd v. Utas Lambang Sdn Bhd* [2009] 7 CLJ 163. E F
- The facts of this case is similar to that of our case ie, it has been more than four months since we served the petition on the respondent and also we served the petition on Encik Isa bin Ismail. G
- Enough time has been given to everybody to appoint counsel or to file their respective affidavit to oppose the petition. It is not fair today to prejudice the petitioner even more when the petitioner has complied with all the requirements under the law. The default is that of the respondent. H
- (f) The application filed yesterday, 17 February 2009 was as regards: I

- A (a) striking out the petition
 (b) asking for a stay in winding up proceeding
 (c) extension of time to hear application to strike out.

B Decision

[6] If the respondent intends to contest a winding up petition it should file an affidavit to oppose the petition under r. 30(1) of the Companies (Winding Up) Rules 1972 which reads as follows:

- C 30(1) Affidavits in opposition to a petition that a company may be wound up shall be filed and a copy thereof served on the petitioner or his solicitor at least seven days before the time appointed for the hearing of the petition.

D **[7]** However, the respondent issued and served to the petitioner a notice of intention to appear under r. 28 Companies (Winding Up) Rules 1972. At the hearing, counsel for respondent urged the court to adjourn the winding up proceeding on the basis that it had filed unfortunately on the day before the hearing the application to strike out and set aside this petition for winding up respondent company.

E **[8]** If the respondent is serious in contesting the matter, it should have filed those applications months ago immediately after it was served with the petition on 27 November 2008. It has more than two and a half months to do so. Instead, it filed the application on the day before the proceeding. I find that this is an attempt to simply delay the hearing of the petition.

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[9] It is an undisputed fact that an affidavit to oppose the petition under r. 30 of the Companies (Winding Up) Rules 1972 was not filed.

G **[10]** In the Court of Appeal case of *Crocuses & Daffodils (M) Sdn Bhd v. Development & Commercial Bank Bhd* [1997] 3 CLJ 485, Siti Norma Yaacob JCA (as she then was) said:

H By their words and expression, r. 30(1) is mandatory in nature and as such the learned Judge was correct when he refused to admit all four affidavits in opposition for non-compliance of that particular rule. The fact that the four affidavits were only relied upon on 24 November 1995 does not alter the position as such affidavits were intended for use in the earlier hearings which never took place as all the earlier hearings were adjourned for some reason or other.

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[11] It is also interesting to note the facts and decision made by the Court of Appeal in *Anvest Corporation Sdn Bhd v. Wong Siew Choong Sdn Bhd* [2008] 3 CLJ 317. The grounds of that appeal was against the High Court's refusal to accept the purported tender for settlement which the appellant contended as being 'unreasonable, unfair and without basis'. Abdull Hamid Embong JCA, delivering the judgment of the court said:

The exercise of the High Court's discretion in rejecting the purported settlement on the very day of the hearing of the petition and its refusal for an adjournment was, in the circumstances, not wrong. The appellant was required in law to file an affidavit in opposition to the petition, which it had not done (r. 30(1) of the Companies (Winding-up) Rules 1972).

[12] Based on the above reasons, I allowed order in term as in encl. (1).

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